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No. 92-1827

In The

Supreme Court of the United States

October Term, 1992

FRANK BONA, SR.,

Petitioner,

vs.

MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, the Respondents are dissatisfied with the Petitioner's presentation of the Statement of the Case and, thus, will set forth their objections and correct any inaccuracies or omissions in the Petitioner's Statement of the Case.

The Respondents object to the Petitioner's statement that the Assignment of Contract (hereinafter "Assignment") was terminated by the parties. Petitioner, as President of New K Investments of Florida, Inc., entered into a written contract with a third party for the sale and purchase of certain real property that was located in Broward County, Florida. The contract set forth a purchase price of $501,000 and further required a $50,100 deposit. The Petitioner, on behalf of New K Investments of Florida, Inc., entered into the Assignment with the Respondents. As consideration for the Assignment, the Respondents paid to the Petitioner $55,100, which represented a $50,100 deposit and a $5,000 reimbursement for an extension fee paid by the Petitioner. The record clearly reflects that the Assignment was not terminated by the parties.

It was undisputed that the Petitioner would take title to the property in his personal capacity with a view to later transfer the property to the Respondents. At the time of the closing with the third parties, which occurred on August 27, 1990, Respondents paid to the Petitioner, or on Petitioner's behalf, $172,964.84, which amount included a $25,000 profit to the Petitioner for entering into the Assignment. The remainder of the purchase price was paid by the Petitioner through his obtaining a mortgage in the amount of $375,000. It was agreed between the parties that the Respondents would either assume the Petitioner's mortgage or obtain new financing if the assumption was not approved.

On October 30, 1990, the Petitioner requested that a Contract for Sale and Purchase be entered into between the parties (hereinafter "Contract"). The reason for the execution of the Contract was because Southeast Bank would not release an assumption package to the Respondents until the contract had been executed between the parties.

The Respondents object to the Petitioner's statement that the

delivery of the two promissory notes marked "paid in full" was a condition precedent to the closing of the Contract. The intention of the parties was for the return of the promissory notes concurrent with the delivery of the deed which was agreed to by the parties two months prior to the Agreement created by the Petitioner. The promissory notes were represented on the Contract as a deposit against the sale price, such that, upon closing, the balance due from the Respondent would be $375,750.

Respondent additionally objects to the Petitioner's statement that the Contract made time of the essence. The Contract states:

> This transaction shall be closed and the deed and other closing papers delivered on December 31, 1990, unless extended by other provisions of the contract.

After the contract was entered into, the parties entered into a subsequent agreement (hereinafter "Agreement"), which was prepared by the Petitioner. The Agreement places additional burdens upon the Respondents including the delivery of the promissory notes to the Petitioner marked "payment in full", and requires the Respondent to pursue with diligence the assumption of the mortgage in order to assure a closing date of December 31, 1990, wherein, time is of the essence. The Agreement was unenforceable for many reasons, but primarily because there was no consideration given to the Respondents. The Respondents have tendered the promissory notes to the state court.

It is undisputed that the Respondents took possession of the property immediately after title had been transferred to the Petitioner. The Respondents have paid each of the mortgage installments to Sears Mortgage and Southeast Mortgage since taking possession of the property. The Petitioner did make one mortgage payment, for which he was reimbursed by the

Respondents, due to the fact that the mortgage had been sold by Southeast Mortgage to Sears Mortgage Corporation and the Petitioner failed to notify Respondents of the transfer.

It is undisputed that a closing date was scheduled between the parties for December 31, 1990 at Columbia Title. On December 31, 1990, Columbia Title notified the Petitioner that they were awaiting approval of the Respondents' assumption of the Petitioner's mortgage with Sears Mortgage Corporation; and that the Petitioner should contact Columbia Title in order to reschedule the closing for the first week of January, 1991.

It has been the Respondents' position that even if there was a valid and enforceable "time is of the essence" clause, the Petitioner expressly and impliedly waived the clause, which is supported by the record. The record reveals that a closing date was agreed to by the parties and scheduled for January 4, 1991 at Columbia Title. Both the Respondents and the Petitioner were present at the January 4, 1991 closing. Prior to the closing actually taking place, Columbia Title received bank verification that the Respondents had been approved for the loan assumption. However written verification would not be forthcoming until a few days later. Columbia Title advised both parties that upon verbal approval by Sears Mortgage Corporation, the closing could take place, however, the Petitioner refused to close the transaction. The Petitioner contended that he did not close the transaction because the Respondents have been "ungentlemanly towards me". Thereafter, Columbia Title received written verification that the loan assumption had been approved, and notified both parties. The Petitioner has continually refused to close this transaction and has brought this suit for specific performance.

The state court interpreted the Contract and the subsequent agreements made thereto, and enforced it pursuant to its terms and the intentions of the parties. The state court's ruling in no shape or

form constituted an impairment of the obligations of contracts in violation of Article I Section 10 paragraph 1 of the Constitution of the United States.

The Petitioner is incorrect when he states that the Supreme Court of Florida affirmed the decision of the lower courts. The Supreme Court of Florida dismissed the appeal because it was without jurisdiction.

REASON FOR GRANTING THE WRIT

I.

THE SUPREME COURT HAS NO JURISDICTION, THEREFORE, THESE PROCEEDINGS ARE AN ATTEMPT BY THE PETITIONER TO APPEAL AN ADVERSE DETERMINATION OF THE STATE COURT WHICH DOES NOT INVOLVE A FEDERAL QUESTION OF LAW.

The Petitioner has sought review pursuant to 28 U.S.C. § 1255, and contends that the state court has decided a federal question in a way that conflicts with applicable decisions of this Court and the Constitution of the United States. 28 U.S.C. § 1257 confers discretionary jurisdiction on this Court to review decisions of the state courts. 28 U.S.C. § 1257 states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or

> immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The federal district court has no jurisdiction over proceedings which are essentially an effort to appeal adverse determinations of the state court where the suit does not challenge the constitutionality of state laws, but only requests personal relief solely to vindicate individual claims. *Dasher v. Supreme Court of Texas*, 650 F.2d 711 (Fed. Cir. 1981). The issues raised by the Petitioner in his Petition are wholly a matter of conjecture which are being raised for the first time. The Petitioner is attempting to challenge the state court judgment on two additional grounds. The Petitioner argues that the state court decision constitutes a denial of his due process rights pursuant to the Fourteenth Amendment and an impairment of his right to contract in violation of the United States Constitution, Article I, § 10, Clause 1. Neither of these claims are properly before this Court because they were not raised or addressed in the state court. The Petitioner has failed to provide a record which establishes that the federal questions were raised in the state court. It is essential that a federal question be brought to the attention of the state court. *Greenbay & Mississippi Canal Company v. Patton Paper Co.*, 172 U.S. 58, 43 L. Ed. 658 (1989); *Yee v. City of Escondido, Cal.*, 112 S. Ct. 1522 (1992). In *Yee*, the Yees did not include a due process claim in their complaint, nor did they raise it in the appellate court. It was not until they petitioned to the California Supreme Court that the Petitioners finally raised a substantive due process claim. The state supreme court denied discretionary review and expressed no views as to the merits. In essence, the Petitioners failed to raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

The Court in *Yee*, stated:

> In reviewing judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with rare exceptions, refused to consider petitioners' claims that were not addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S. Ct. 2317, 2321-2323, 76 L. Ed. 527 (1983) . . . Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

Yee at 1531.

If nothing in the record indicates that a federal question was presented to the state court, the Supreme Court will not take judicial notice that a federal question might have been involved in the case. *Yazoo & M.R. Co. v. Adams,* 180 U.S. 41, 45 L. Ed. 415 (1901).

In connection with a certiorari petition seeking the United States Supreme Court's review of a state court decision, there should be no doubt from the record that a claim under a federal statute, or the United States Constitution, was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. *Webb v. Webb,* 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981). If the constitutional right was not set up or claimed in the proper court below, the judgment of the highest state court is conclusive, so far as the right of review to this Court is concerned. *Miller v. Texas,* 153 U.S. 535, 38 L. Ed. 812, 14 S. Ct. 874 (1894).

The Supreme Court's jurisdiction to review a state court decision, whether by appeal or by certiorari, is dependent upon the

presence of a federal question in the case. *St. Louis, I.M. & S.R. Co. v. Taylor,* 210 U.S. 281 (1908). The Supreme Court is not a court of general jurisdiction which can correct any error in state court proceedings; its powers are limited to correcting denials of federal rights in specific instances. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 53 L. Ed. 417 (1909).

In the case at bar, it is clear from the record that the claims now being raised by the Petitioner were not made to the state court pursuant to a federal statute or the United States Constitution. Nowhere does the record disclose that the state court was apprised of the nature or substance of the federal claims made by the Petitioner. In order for a state court case to be reviewed by the Supreme Court, it must appear from the record that a federal question was decided by the state courts, or that the judgment rendered could not have been given without the citing of a federal question. *First National Bank v. Estherville,* 215 U.S. 341, 54 L. Ed. 223 (1910); *Harding v. Illinois,* 196 U.S. 78, L. Ed 394 (1904). It is not sufficient that the federal question was raised or might have been decided by a state court; the record might show expressly, or by necessary implication, that a federal question was actually decided by the state courts adversely to the Petitioner. *Kansas Endowment Association v. Kansas,* 120 U.S. 103, 30 L. Ed. 593; *Sayward v. Denny,* 158 U.S. 180, 39 L. Ed. 941 (1895).

The Supreme Court has held that there may be grounds for dismissing an appeal to the United States Supreme Court from a state court where it does not appear that a state court expressly passed upon a federal question. *Bells G.R. Co. v. Pennsylvania,* 134 U.S. 232, 33 L. Ed. 892 (1890).

Several presumptions are used to determine if the state's highest court did actually determine a federal question. *Chambers v. Mississippi,* 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). If the highest state court has failed to expressly pass on a

federal question, it is assumed that the omission was due to a failure to properly present the federal question to the state courts unless the Appellant or Petitioner in the United States Supreme Court can firmly show to the contrary. *Street v. New York*, 394 U.S. 576, 22 L. Ed. 572, 89 S. Ct. 1354 (1969). It therefore assumed that the omission was due to a failure of the Petitioner to properly present any federal question. Another presumption is utilized by the Supreme Court if there is no opinion written by a state supreme court. If no opinion was written and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 76 S. Ct. 806 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 96 L. Ed. 1130, 72 S. Ct. 832 (1952). In the case at bar, not only did the state supreme court not render an opinion, but they dismissed the appeal for lack of jurisdiction. The Supreme Court of Florida stated:

> It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed.
>
> No motion for rehearing will be entertained by the Court.

The Florida Rules of Appellate Procedure 9.030(a)(2)(A) gives the state supreme court discretionary jurisdiction to review:

> (A) decisions of the district courts of appeal that:
>
> (i) expressly declare valid a state statute;
>
> (ii) expressly construe a provision of the state or federal constitution;

> (iii) expressly affect a class of constitutional or state officers;
>
> (iv) expressly and directly conflict with a decision of another district court of appeal or the Supreme Court on the same question of law;
>
> (v) pass upon a question certified to be of great public importance;
>
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal.

If the state supreme court lacked discretionary jurisdiction to review the Petitioner's claim, then this Court certainly does not have jurisdiction.

The United States Supreme Court has no authority to review state determinations of purely state law, nor does it review federal issues that can have no affect on the state court's judgment. *Longshoreman's Association v. Davis*, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986). It is well accepted that the United States Supreme Court will not review a decision of a state court resting upon adequate and independent non-federal grounds. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183 (1935). The decision rendered by the state court was determined on state grounds and there is no reference in the record to a federal question.

II.

THE STATE COURT'S INTERPRETATION OF THE CONTRACT AND ITS GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS DOES NOT CREATE AN IMPAIRMENT OF CONTRACT IN VIOLATION WITH ARTICLE I, SECTION 10, CLAUSE 1 OF THE UNITED STATES CONSTITUTION AS THE PETITIONER WOULD LIKE THIS COURT TO BELIEVE.

Article I, Section 10 of the Constitution provides:

> No state shall . . . pass any . . . law impairing the obligation of contracts.

Impairment of a contract by judicial decision does not raise a federal question which can be reviewed by this Court. *Kryger v. Wilson*, 242 U.S. 171, 61 L. Ed. 229, 37 S. Ct. 34 (1916). This Court cannot review judgments of state courts on the grounds that they refuse to give effect to valid contracts or impaired obligations of contracts, where the obligations are not impaired by the law of the state. *St. Paul, M. & M.R. Co. v. Todd County,* 142 U.S. 282, 35 L. Ed. 1014, 12 S. Ct. 281 (1892). Based on this reasoning alone, the Court should deny Petitioner's request for certiorari.

Petitioner claims that the state court's Order on Motion for Final Summary Judgment for Specific Performance (attached to the Petitioner's brief as App. 11) substantially impaired the obligations of the agreements between the parties. The Petitioner's brief is nothing more than a futile attempt to create a federal question to invoke this Court's jurisdiction. The state court decided from the pleadings, depositions, answers of interrogatories and admissions on file, together with affidavits, that there was no genuine issue as to any material fact. The state court interpreted the

contract together with all subsequent modifications made thereto, and decided on independent state grounds that the Respondents were entitled to specific performance.

The Court in *General Motors Corp. v. Romain*, 112 S. Ct. 1105 (1992) stated:

> Generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed 569 (1983); *Energy Reserves Group, Inc., v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 569 (1983).
>
> This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.

In the present action there has been no amendments or modifications to the state law which would change the legal enforceability of the agreements entered into between the parties.

> The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws and existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the order . . . If any subsequent law effect to diminish the duty, or to impair the right, it

> necessarily bears on the obligation of the contract. *McCracken v. Hayward,* 2 HOW. 608, 612, 11 L. Ed. 397 (1844). *See also, Von Hoffman v. City of Quincy,* supra.

General Motors Corp. v. Romain, 112 S. Ct. 1105 (1992). In the present action the obligation of the agreement was binding on the parties and there was no subsequent law to diminish the duty, or to impair the right of the obligations of the contract. There were no changes in the remedies available under the contract, which may convert an agreement enforceable at law into a mere promise, thereby, impairing the contract's obligatory force. *General Motors Corp.* at 1111.

REQUEST FOR ATTORNEY'S FEES

The Respondents request attorney's fees and costs be awarded to them pursuant to the contract and the federal statutes/rules.

CONCLUSION

For these reasons, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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